

The Rise of a Third Generation of Arbitrators?

Fifteen Years after Dezalay and Garth

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ABSTRACT

Fifteen years ago, sociologist Yves Dezalay and lawyer Bryant Garth wrote an enormously successful book in which they asked a simple but important question: What sort of people become successful arbitrators? The main result of their research was to identify two quite different generations of arbitrators. The first they called the 'Grand Old Men'. They were people who had risen to the top of their national legal professions, but had not specialized in the field of arbitration; men whose general legal and social aura made them credible arbitrators. The second generation, which prevailed at the time of Dezalay and Garth's study, were assigned the name of 'Technocrats', in the sense of technical experts. Successful arbitrators of that generation typically acquired their credentials through activities in the field of international arbitration. They usually had a career almost entirely dedicated to arbitration. Now, how have things changed in the last fifteen years? This is the question this article seeks to address. The authors have tried to replicate (on a smaller scale) Dezalay and Garth's sociological survey, in order to identify the main criteria on which arbitrators and chairpersons are selected today. On that basis, the authors try to formulate abstract propositions about the identity of a third generation of arbitrators on the rise: the Managers.

Fifteen years ago, sociologist Yves Dezalay and lawyer Bryant Garth published an enormously successful book about arbitration, entitled *Dealing in Virtue*.¹ Having understood the regulatory importance of international arbitrators, they asked a simple but important question: What sort of people become successful arbitrators?

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¹ Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press 1996).

They made their answer succinct, and rather compelling. The main result of their research was the identification of two quite different generations of arbitrators. The first they called the 'Grand Old Men' (no misogyny here, they really were males). They represented the past generation. They were people who had risen to the top of their national legal professions, but had not specialized in the field of arbitration; men whose general legal and social aura made them credible arbitrators. These men typically developed 'platforms' outside of arbitration and then entered the field at a very high level.² The second generation, which prevailed at the time of Dezalay and Garth's study, were assigned the name of 'Technocrats' by the authors. ('Technocrats' was meant as technical experts, not proponents of technocracy.) Successful arbitrators of that generation typically acquired their credentials through activities in the field of international arbitration.³ They usually had a career almost entirely dedicated to arbitration. In 1996, the Dezalay and Garth study suggested that the principal quality, almost necessary and sufficient in terms of logic, required to be a successful arbitrator was a great command of the technicalities of arbitration.

That evolution in profile, they thought, was merely a reflection of arbitration's own evolution: arbitration had simply become much more technical, and mere grandeur was no longer a sufficient competitive advantage. It took a proper technician to master arbitration proceedings.

Now, we might ask, what happens when arbitration becomes over-technical – or rather, as the jargon in the field has it, over-proceduralized or over-judicialized?⁴ Is it possible that what it takes to become a successful arbitrator has changed again, that it is no longer sufficient to be a master technician but that something else is required? Is a third generation of successful arbitrators emerging?

In order to answer that question, we conducted a sociological study of the profiles sought after today in the appointment of arbitrators, and chairpersons. And it seems that a picture is emerging indeed: a picture of a new generation of arbitrators as managers of dispute resolution processes. When appointing arbitrators, the parties appear to place a great deal of importance on the management capabilities of their designees, that is, we may presume, their organizational skills, their propensity for quickly and accurately identifying the salient issues (which may not only be legal), and their abilities to deal with the underlying emotions. These management capabilities that are sought after apply to the management of the proceedings, the deliberations of the arbitral tribunal, the organization of work within the tribunal, and the process of producing an award.

Put bluntly, this evolution is evocative of arbitration as a dispute resolution process of business, by business, for business. Even more brutally summarized,

² *Id.* at 21.

³ *Id.* at 24.

⁴ See, e.g., William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in Loukas A. Mistelis & Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration* 146 (Kluwer Law International, The Hague 2006); Richard B. Lillich & Charles N. Brower (eds), *International Arbitration in the 21st Century: Towards 'Judicialization' and 'Uniformity'* (Transnational Publishers, Inc. 1993).

today more than in the past, parties seem to see disputes going to arbitration as just another business problem, to be dealt with – ‘managed’ – just as another business problem, and neither as a problem of justice for grand old people, nor as a problem of eminent legal intricacy for super-technicians. (This does not mean, of course, that we as analysts should not reflect upon arbitration as a system of justice and legal accuracy.)

This article moves in three parts. We begin with a brief presentation of the background and methodology of our study. In section 2, we move on to identify the main criteria on which – according to our survey – arbitrators and chairpersons are selected today. The final part of this article seeks to construct, from these observations, abstract propositions about the identity of a third generation of arbitrators on the rise: the Managers.

I. BACKGROUND AND METHODOLOGY

The premise of Dezalay and Garth’s study was that ‘values of specific forms of symbolic capital and their market equivalences are not necessarily stable. Different kinds of symbolic capital may gain or lose in value over time.’⁵

Symbolic capital is ‘the recognition, institutionalized or not, that [different agents] receive from a group.’⁶ It is symbolic wealth that confers authority and charisma. It is based on the recognition by society of a particular status, of prestige, of specific qualities, abilities or assets. It operates by accessing and mobilizing the symbols and symbolic resources of a culture. A person, a body of persons or an institution has symbolic capital if they are recognized by society as having some characteristics that are valuable in a given field. This capital comes from these persons or institutions showing certain symbols that are recognized by society. If we take the example of being an arbitrator, symbolic capital boils down to displaying the socio-professional characteristics that make a person a credible arbitrator. The more an arbitrator can display the socio-professional characteristics that make him/her a credible and trustworthy dispute resolver, the more frequently he/she is selected. So goes the theory.

Dezalay and Garth, then, wanted to know how the required characteristics for being a successful arbitrator had changed between the seventies and the early nineties, how the value that international lawyers place on certain forms of symbolic capital had changed in the interval. They sought answers to that question by carrying out interviews and making surveys of arbitrators and counsel appointing arbitrators.

⁵ Yves Dezalay & Bryant Garth, *Dealing in Virtue : International Commercial Arbitration and the Construction of a Transnational Legal Order* 19 (The University of Chicago Press 1996).

⁶ Pierre Bourdieu, *Language and Symbolic Capital* 72 (Harvard University Press 1993): (‘the weight of different agents depends on their symbolic capital, i.e. on the *recognition*, institutionalized or not, that they receive from a group’). See also, for a definition of symbolic capital, Craig Cahoun, *Symbolic Capital in Dictionary of the Social Sciences* (OUP 2002): Symbolic capital is the ‘[r]esources available to a social actor on the basis of prestige or recognition, which function as an authoritative embodiment of cultural value.’

In this current study, we sought to determine how the required characteristics for being a successful arbitrator have changed between the first half of the nineties and today. To do that, we adopted a similar methodology to that used by Dezalay and Garth, namely a sociological study taking the form of interviews with arbitrators and, primarily, a survey of those people who appoint arbitrators today. In sum, our purpose is to reproduce and update Dezalay and Garth's study, though in a manner that is more modest in its scope and much more succinct in its articulation. The assumption that prompted us to conduct that study was that changes in the global practice of arbitration seem likely to reflect on what people expect today from arbitrators and, therefore, what counts as symbolic capital for arbitrators.

Over a period of six months, we conducted a survey of lawyers and arbitrators engaged in international arbitration on the attributes that are important when appointing arbitrators in international arbitrations. The sample of people selected to participate in the survey were drawn from lists of arbitrators and lawyers practicing in arbitration made available by the Swiss Arbitration Association, the London Court of International Arbitration, the Chartered Institute of Arbitrators, the American Arbitration Association, the Hong Kong International Arbitration Center, and Legalease's The Legal 500 Series. Those contacted were asked to participate in either an email survey (completing a two-page questionnaire) or an online survey (answering questions automatically asked by a server on the Internet). In all cases, the principal questions asked in the survey were the following:⁷

When acting as counsel, on what criteria do you select or recommend an arbitrator? Please rate the following from 1 to 10:

A. Skills and knowledge

Specialisation in the law and practice of arbitration ('arbitration specialists')

Specialisation in a given substantive area of law

Specialisation in a given national legal system

Knowledge of several different legal systems

General academic standing

Specific academic standing in arbitration

Publications in the field of arbitration

Business acumen

Sensitivity to cultural differences

Ability to examine witnesses

Ability to encourage settlement between the parties

Ability to manage proceedings (i.e. to control parties and counsel)

Ability to manage deliberations of arbitral tribunal

Management and organisation of work within the tribunal

B. Experience

Experience as arbitrator

Specific experience as arbitrator in the respective type of arbitration (investment, commercial, construction, etc.)

⁷ The survey, in its different iterations, included further questions, but they did not show significant results and were consequently left out of this article

Experience as counsel in arbitration

Industry experience relevant to subject-matter of dispute

C. Associations and memberships

Non-association with a law firm ('independent arbitrators')

Membership of arbitral committees, working groups and arbitral associations

Positions as high-ranking civil servants (e.g. former judges or ambassadors)

D. Personal characteristics

Country of origin or citizenship

Cost of arbitrator (i.e. expensive or cheap fees)

Past decisions of arbitrator

2. When acting as co-arbitrator, do you select or appoint a chairperson on different criteria? If so, how?

3. In your opinion, what is the most important attribute in an arbitrator?

4. Do you mind an arbitrator who delegates part of the work to his/her staff (e.g. writing the award, preparing for hearings, issuing procedural orders etc.)?

We received 58 responses from people practicing in 23 countries, namely Austria, Belgium, Brazil, Czech Republic, France, Germany, Hong Kong, India, Italy, Mexico, New Zealand, Poland, Portugal, Russia, Singapore, South Korea, Spain, Switzerland, Sweden, Taiwan, the Netherlands, the United Kingdom and the United States. All of the people we surveyed were experienced arbitration practitioners who have a name in the field. In many cases, they were in fact very experienced and eminent arbitration specialists. Accordingly, when they discuss their practice and views about the appointment of arbitrators, their responses reflect the sediments of their experience with dozens, sometimes hundreds of cases. The 58 responses represent indirectly a vastly larger sample of cases. The responses we received are akin to a qualitative survey; the information they stand for comes closer to a quantitative survey.

II. ON WHAT CRITERIA ARE ARBITRATORS SELECTED?

Our study showed that there are three distinct categories of criteria for the appointment of arbitrators – these are personal attributes, really, corresponding to ideas of arbitral competence. The first category includes criteria that the practitioners who were surveyed consistently tagged as *considerably important*: we call them 'primary criteria'. The second category contains attributes that were still considered fairly important, but whose importance was rated very inconsistently among our sample of practitioners: we refer to them as 'secondary criteria'. The third category covers attributes that were ranked so low as to be considered negligible, which is just how we call them. This section then reviews factors that were considered important, and that are interesting to examine, but which have no direct significance for our study. We thereafter proceed to distinguishing the appointment of arbitrators in general from the appointment of chairpersons. Then we end with a coda on how the arbitration practitioners who were surveyed viewed the question of arbitrators delegating parts of their work.

(a) Primary Factors

The attributes that participants considered to be of greatest importance, with an average rating of 8 or above out of 10, and – this is important – a minimal spread of the individual ratings were the following three:

- Specialisation in the law and practice of arbitration
- Management abilities
- Experience as arbitrator

All three criteria were rated at an average between 8 and 9 out of ten. All three criteria were rated by more than 80% of the people surveyed at 7 or more. Put differently, the vast majority of the arbitration practitioners who were surveyed, whom we believe to realistically represent today's arbitration community, considered that the three key and specific factors for the selection of arbitrators today are to be specialized in arbitration, to have strong management skills and to have experience as an arbitrator. Our study also showed additional criteria, such as being committed and professional and actually being available, but they can be left out of the picture here – they are not specific to arbitration, since they are applicable to mostly any other person considered for mostly any other mandate.

We may even proceed to a further reduction: to consider that it is important for being an arbitrator to have already been an arbitrator has relatively limited informative value. It is indeed barely surprising that one factor making a person a credible arbitrator is the fact that this person has been an arbitrator repeatedly in the past, just as a credible mechanic is someone who has been a mechanic in the past. That criterion really only matters when considered in conjunction with the profile of the grand old men, who received greater credit for experience outside the field of arbitration than today's arbitrators seem to do.

With regard to management abilities, the results of the survey may be further qualified: in fact all three attributes dealing with the management capabilities of an arbitrator – the ability to manage proceedings, that is, to control parties and counsel; the ability to manage deliberations of the arbitral tribunal; and management and organization of work within the tribunal – received an average rating between 8 and 9 and each of these attributes were rated above 7 by over 85% of participants. Moreover, many of the people surveyed listed additional or nuanced forms of management skills, making such skills the most discussed and emphasized type of attributes sought after in arbitrators. Such additional or nuanced forms of management skills, mentioned by the participants, were for instance 'firm hand'; 'natural authority... consensual approach'; 'ability to run a proceeding'; 'ability to manage the proceedings fairly and efficiently'; 'ability to cut to the chase quickly'; 'an ability to conduct proceedings efficiently and fairly'; 'ability to resolve a dispute efficiently in a way where both parties feel that their case has been understood'; and 'balance between flexibility and control'.

The study showed that a further factor was considered important in the selection of arbitrators: the envisaged person's sensitivity to cultural differences.

This attribute, however, although it received an average rate of 8, must be placed in a different category than the three criteria above, as responses on the importance of sensitivity to cultural differences were significantly more widely spread, from 5 to 10. There appears to be more disagreement among arbitration practitioners about the importance of this factor.

(b) Secondary Factors

A second main category of factors for the appointment of arbitrators includes those that were, on average, considered fairly important but about which there was significant variance among the people surveyed. The attributes included in this category received ratings between 4 and 7, but all of them were characterized by a high degree of variation in the responses, which mostly ranged from 0 to 10 and at best had a point spread of 7 (for instance 3 to 10).

Attributes that received an average rating of 7:

- Specialization in a given substantive area of law (spread of 3 to 10)
- Specific experience as arbitrator in the respective type of arbitration (spread of 2 to 10)
- Business acumen (spread of 0 to 10)

Attributes that received an average rating of 6:

- Specialization in a given national legal system (spread of 1 to 10)
- Industry experience relevant to subject-matter of dispute (spread of 1 to 10)
- Knowledge of several different legal systems (spread of 0 to 10)
- Experience as counsel in arbitration (spread of 0 to 10)
- Past decisions of arbitrator (spread of 0 to 10)

Attributes that received an average rating of 5:

- Country of origin or citizenship (spread of 0 to 9)
- General academic standing (spread of 0 to 9)
- Specific academic standing in arbitration (spread of 0 to 9)
- Ability to examine witnesses (spread of 0 to 9)
- Publications in the field of arbitration (spread 1 to 8)

Attributes that received an average rating of 4:

- Ability to encourage settlement between the parties (spread 0 to 10)
- Membership of arbitral committees, working groups and arbitral associations (spread of 0 to 8)
- Cost of arbitrator (spread of 0 to 8)

As was mentioned above, all of the people we surveyed were experienced arbitrators, who had been involved in a number of cases and had acquired a name in the field. It follows that, for all of the criteria that we call 'secondary factors', there were experienced people who thought they were no relevant at all, and other experienced people who thought they were of considerable importance. Accordingly, it appears that these attributes should play a minimal role in our attempts to define the main traits of arbitrator selection today. The larger the spread, the less relevant the observation inferred from it in terms of generalization, and thus in terms of identifying the principal features defining a 'generation of arbitrators'. Even if the spread allowed meaningful observations, the attributes discussed here received a lower average rating than those identified above as 'primary factors', and accordingly they appear to be less relevant in defining the contours of the bases on which arbitrators are appointed today.

(c) Negligible Factors

The attributes that participants considered to be of least importance, with an average rating below 3 out of 10 were the following two:

- Non-association with a law firm.
- Having held positions as high-ranking civil servants (e.g. former judges or ambassadors).

Considering the number of attributes that were considered important – primary and secondary factors – and the low ranking of these two attributes, it appears reasonable to say that they are negligible.

The reason for our inclusion of these two possible criteria for the appointment of arbitrators was as follows. Given the increasing pressure and scrutiny of the independence of arbitrators, we were wondering whether people would consider it an advantage to appoint an independent arbitrator, who is not subject to the complications and jeopardies following from having many partners and associates in a law firm. The reason for the inclusion of former positions as high-ranking civil servants was a way to assess how the generation of grand old people was faring. Almost 50% of participants rated the latter criterion as strictly irrelevant – rating it at 0. It no longer matters to be a grand person – in the meaning that Dezalay and Garth gave the word.

(d) Tangential Factors Not Directly Relevant to Our Study

A few further factors for the selection of arbitrators emerged from our survey. They are not directly relevant to our study, either because they are not personal attributes, or because their importance is so fundamental that they are entirely 'trans-generational'. Since they relate to all generations of arbitrators, they do not help in discerning the contours of a possible current generation. These factors are, for instance, independence, integrity, good judgment, even 'character', but above

all impartiality.⁸ (Let us stop short here, of relaying mentions of requirements such as being intelligent, dynamic, serious and competent; the power of elucidation of such attributes is not very meaningful.) A further factor, which is not a personal attribute, that may be worthy of mention is what many participants in the survey called 'personal experience with arbitrator', which was often considered paramount. It should be pointed out that such personal experience was often not necessarily meant as experience with the arbitrator in his or her capacity as arbitrator, but almost any experience, including 'cultural affinity', 'professional affinity' and any 'personal contacts'. Such statements are evocative of the view frequently expressed elsewhere that arbitration is a 'club'. But, again, such personal affiliations and contacts are not determinative of the sort of people who are appointed as arbitrators, which is the question that we are dealing with here.

(e) *On What Criteria Are Chairpersons Selected?*

Participants were asked if they select or appoint a chairperson of an arbitral tribunal on different criteria. According to our results, the criteria on which chairpersons are appointed are the same as for arbitrators in general, although almost systematically the participants placed greater emphasis on case management skills and human management abilities.

The open-ended questions we asked the participants about the additional qualities they were seeking when selecting a chairperson yielded responses whose more meaningful parts are reproduced here: 'management qualities are more important', 'I try to find a person who is... practical and efficient. I look for someone who will get the job done quickly and decisively'; 'ability to manage the proceedings'; 'authority over or respect from the co-arbitrators'; 'good back-office (person who can assist, own secretary)'; 'running proceedings and organizing a tribunal'; 'management of parties and co-arbitrators'; 'ability to manage arbitral proceedings and the deliberation of the tribunal are considered particularly important'; 'ability to manage the arbitral process/deliberations'; 'more emphasis [on] management arbitration'; 'management capabilities then are predominant'; 'much greater emphasis on efficiency as a manager and force of personality'; 'ability to have successful relationship'; 'collegiality'; 'administrative experience'; 'I try to appoint a chairperson who presumably will be able to work smoothly with both co-arbitrators.'

⁸ Impartiality was repeated by a number of participants as being the most important attribute to consider when appointing or recommending an arbitrator. This result is consistent with the results of a similar survey of in-house counsel in the United States in 2002. In that survey it was reported that 87 percent of respondents indicated a preference for 'all arbitrators, whether party-appointed or not, to act in a neutral manner during the arbitral process': Douglas Earl McLaren, *Party-Appointed Arbitrators: A Comparison*, 20 J. Intl. Arb. 233-245 (2003). This result also correlates with the findings of a survey by the Global Centre for Dispute Resolution Research in 2000 which found that the highest ranked factor of importance of surveyed parties and attorneys to arbitrations administered by the American Arbitration Association (AAA) was a 'fair and just outcome'. See Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 Int'l Bus. Law. 203 (2002).

A few participants also placed emphasis on experience and ‘full impartiality’ – in this context, the latter concept clearly appears to obtain by degrees.

(f) *A Coda: The Acceptability of Arbitrators Delegating Work*

A final question was asked of participants, namely, whether they mind an arbitrator who delegates part of the work to his/her staff (for instance writing the award, preparing for hearings, issuing procedural orders, etc.). Two-thirds of participants (65% exactly) responded no, they did not mind an arbitrator who delegates part of the work.

III. A NEW GENERATION?

What propositions about a possible third generation of arbitrators on the rise can we construct on the observations made above, while avoiding to engage in simple conjectures?

First of all, participants rated specialization in the law and practice of arbitration as one the most important attributes when appointing or recommending an arbitrator, suggesting that mastering the technicalities and procedures of arbitration is still essential to being a successful arbitrator today. Redfern and Hunter’s dictum still seems to hold: ‘Probably the most important qualification for an international arbitrator is that he should be experienced in the law and practice of arbitration.’⁹ Being a technocrat still seems to be a necessary attribute of a successful arbitrator. But perhaps it is no longer a sufficient one – or more precisely, doing some violence to logic here, it is no longer as sufficient an attribute as it used to be.

Probably the most striking attribute revealed in the results is that arbitrators today must possess strong management abilities. It was very important to participants that an arbitrator must be able to manage the proceedings, the deliberations of the arbitral tribunal and the organization of work within the tribunal. Management abilities were also cited by a number of participants as the single most important attribute to consider when appointing an arbitrator. In the words of one participant, the current generation of arbitrators are ‘professional dispute managers’.

These management abilities are considered to be even more important when appointing a chairperson. This is not terribly surprising, of course. Arbitration institutions have recognized this for a long time. Eva Müller, former Assistant Secretary General, Arbitration Institute of the Stockholm Chamber of Commerce, for instance wrote in 2000 that:

[t]he chairman of the arbitral tribunal is responsible for ensuring that the arbitral proceedings move forward as smoothly and effectively as possible. Therefore he or she must be experienced in

⁹ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 205 (3d ed., Sweet & Maxwell 1999).

chairing an arbitration and in managing hearings and exchange of written submissions between the parties etc.¹⁰

From there it is only a small step to say that another aspect of the managerial abilities of the arbitrator is the ability of the arbitrator to manage the process of producing an award.

The idea that there is more to being a good arbitrator than merely being a technocrat – a great technician of the law and practice of international arbitration – has been around for quite some time. The opinion that great managerial skills are part of the picture has also been in the air for a while. The question is whether we should define a generation of arbitrators around it, as the results of our study would seem to suggest.¹¹ *That* would be new.

What consequences would this have? If the socio-professional role of certain people change, then the acceptability of certain ways in which they carry out their role is likely to change too. A manifestation of this in the current case, which not trivial, is the following. Sixty-five per cent of participants responded that they did not mind if an arbitrator delegated the arbitrator's preparation for hearings, issuing procedural orders and even writing the award. Brutally simplified, this seems to be an indication that arbitrators are seen as managers today, only responsible for the product, with no mandate to do the work themselves. The theory about the mission of arbitrators, then, if it intends to be descriptive and not prescriptive, may have to be adapted.

¹⁰ Eva Müller, *How Do International Institutions Select Arbitrators?*, 17 J. Intl. Arb. 157–162, 160 (2000).

¹¹ When we asked the participants themselves how they view the current generation of arbitrators, they responded essentially in one of three ways: (1) they referred to the current generation of arbitrators as Grand Old Men, but when asked what they meant, it appeared that this merely meant well-known people; (2) they referred to the current generation as Technocrats, but mostly acknowledged that there was something more entering the mix ; or (3) they described the new generation as 'dispute managers', 'professional dispute managers', 'the case manager', 'businessmen', 'culturally sensitive and business oriented', 'they've become less academic and more 'commercial', 'solution-seekers', 'practical pragmatists'. One participant said: 'we want to get the job done, fairly, quickly, and without undue navel-gazing.'

